Danish Creamery Association *and* Rory A. George.
Case 32-CA-3415

December 7, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

September 7, 1982, Administrative Law Judge Joan Wieder issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt her recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Danish Creamery Association, Fresno, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge: This case was heard in Fresno, California, on May 26, 1982.[1] The charge was filed on February 13, 1981, by Rory A. George, an individual, which was amended on March 10, 1981. A complaint was issued on August 24, 1981, alleging that Danish Creamery Association, herein called the Company or Respondent, unlawfully threatened, coerced, and discharged the Charging Party, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended.[2] Respondent admits in its answer that George was discharged but denies that the discharge was unlawful or that it committed any violations of the Act.

[1] All dates herein are in 1980 unless otherwise indicated.

[2] The complaint was amended at hearing pursuant to a stipulation.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.

Upon the entire record, including especially my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a California corporation engaged in the manufacture of butter, nonfat dry milk, and bulk milk fluid and has an office and place of business located in Fresno, California. It further admits that during the past year, in the course and conduct of its business, it has sold goods and services valued in excess of $50,000 to customers within the State of California, which customers or business enterprises themselves meet one of the Board's jurisdictional standards. Accordingly, it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that Creamery Employees and Drivers Union Local No. 517, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, is a labor organization within the meaning of Secton 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent manufactures butter and powdered milk. The plant operates 24 hours a day, 7 days a week, and employs approximately 52 workers. John Payne is the president and manager of the Company, and Thurman Chance is the plant superintendent or production supervisor.[3] Eric Ludtke and Leroy Fleming are foremen and supervisors, as Respondent admitted in its answer to the complaint. At the hearing, Respondent indicated that it wished to dispute Fleming's and Ludtke's supervisory status as alleged in the complaint, but refused repeated offers to consider making a motion to amend its answer to the complaint to permit consideration of such an alteration in the scope of the issues.[4]

[3] There is no question that both Payne and Chance are statutory supervisors.

[4] It is noted that Respondent was represented by a labor consultant and not an attorney at law. As the Fourth Circuit noted in *N.L.R.B.* v. *Tri-State Transport*, 649 F.2d 993, 1004, fn. 11 (1981):

> In factfinding proceedings such as this, a *pro se* litigant undoubtedly struggles at a grave disadvantage when opposed by attorneys well-versed in the legal significance attached to certain facts, and skilled in the art of exposing them to a hearing officer. However, the Labor Relations Act allows a party to choose its representative in appearing in Board proceedings, *see* 29 U.S.C. § 160(b)(1976), including a nonattorney. See *Tred-Air of California, Inc.*, 193 NLRB 672, 673 (1971), *enfd.* 82 LRRM 2080 (9th Cir. 1972), *cert. denied*, 411 U.S. 906 (1973) (corporation may be represented by its president). Absent evidence that [the Company] objected to proceeding at the

Continued

As here pertinent, the Charging Party worked for Respondent from June 1977 to October 6, 1980, as a bagger in the powder room[5] during the 11 a.m. to 7 p.m. shift. Also in the vicinity of the bagging room is the operator of the milk dryer.

B. *Charging Party's Protected Concerted Activities*

The parties stipulated that "Mr. George was constantly engaged in protected activity" by continually calling the Union to ascertain if contract violations had occurred or to complain or grieve about what he believed to be contract violations. For example, approximately 2 months before his discharge, he questioned the Company's failure to pay the employees double time for work performed on a scheduled day off, and eventually the affected employees did receive double time. According to George, "right after we received our doubletime . . . Mr. Chance, when I came into work, told me that I would get my doubletime but he had better not catch me doing anything wrong or he'd get rid of me." Chance did not specifically deny making the statement. He testified that, although he recalled the incident, he could not remember the conversation and made a blanket denial stating he never threatened George about "going to the Union."

George further testified that he raised the issue of double time again about 2 weeks before he was discharged when he was called into work on a scheduled day off. George said he asked Chance if he would be paid double time and Chance replied "that Leroy Cox had told him he did not have to pay doubletime for that day." The following morning, George telephoned Cox and Cox assertedly said that he would call Chance. Later that morning, as George was reporting to work, he passed by Chance who "told me that I'd get my god damn doubetime but he'd better not catch me doing anthing wrong and all he wanted to see back in the powder room was assholes and elbows. Then he told me to get out of the office and get to work before he kicked my ass." George did not claim that there was an explicit threat of discharge during this conversation but, given the history of the relationship and the clear implication of Chance's verbiages, it is concluded that such a threat is inherent in the statement.

Chance indicated that he had numerous discussions with George concerning alleged contractual violations as did Fleming and Ludtke, "usually after he [George] had went [sic] to the Union." At times, George would forewarn Respondent's representatives that he was going to call the Union, but usually he would call the Union first and then a union field representative would inform the Company that George had called about a problem. Chance denies ever threatening George about going to the Union with grievances but did tell "him it would be better if he checked with the Company before he went to the union," that he should consult the Union "if he couldn't get satisfaction from the company . . . ." George's testimony is credited based on Chance's admitted dislike regarding George's practice of going to the Union, conjoined with his demeanor, and George's demonstrated superior clarity of recollection and inherent probabilities.

In August, the day after the first double time incident, according to George, Ludtke attempted to assign the powder room crew work in another department during their breaktime, and George protested that this was a violation of the collective-bargaining agreement. Ludtke represented he would assign the crew any work while they were on the timeclock. George said he would call the Union to resolve the matter and did so, speaking with Kenny Martin. Subsequently, George observed Martin speaking with Ludtke. A couple of days later, Ludtke approached George and said, ". . . you know, Rory, before you started working here this was like one big happy family. Now, since you work here, every time I turn around I'm hearing from the union. Then he told me that I could best stay out of trouble by not calling the union."

Ludtke testified as follows:

> Mr. George had several times the union over there. To my knowledge there was many times more or less like a one way street. What I want to say is this, that work wasn't done properly or time was abused and so on and when I have to see that the job was done, when I ever said something or so, that was like many times I did threaten him that he's going to get fired if the job's not going to be done better or so on and so on. But it was always like whenever a little bit was done or so on he had the union there the next day.
>
> Q. But you had no discussion with him about contacting the union?
>
> A. No, no. He can go anytime he wants. . . .
>
> Q. Let me restate the question, Mr. Ludtke. Did you ever give Mr. George some friendly advice from the area of—did you tell him listen, Rory, I think fair is fair and you are complaining too much to the union and you had better not complain so much to the union and you better come to us first?
>
> Q. Well, we talked about sometimes about it. Like I say, at that time we had a union man here who is not here today—he was the field man—I don't know what it was but he was strictly one-sided. He thought he was voted in. I tried to explain it to him that we have to work together and try to accomplish something. This man here, when he came in, whatever the employer did or did not, he was always right. I couldn't get nowhere with him. Finally—may I finish this, please?—finally on the end of this particular man and this secretary was out of town and we got in this other field man—he wasn't even in this area—he got in there and Rory had to say, they took him in, he came in that night and he had a talk with him. I had three men working for two hours job and they worked three hours overtime on top of that. I told him they're going to get fired if they don't straighten

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hearing without counsel, the case raises no tenable issue of due process. *Local Union No. 742, UBCJA* v. *NLRB*, 377 F.2d 929 (D.C. Cir. 1967).

[5] The bagging operation was a team effort requiring three employees, one to bag the powdered milk; another to weigh, tie, and seal the bags; and a third to place the bags on a shipping pallet.

out. I said you straighten them out, them boys, or they going to get laid off. I told the superintendent that. That came in when the job started getting better and things straightened out a little bit.

Did you ever tell Mr. George that this—meaning the company—this was a big happy family before you came over.

A. It was.

Q. And you told George that.

A. I did.

Q. And you told him that now every time you turn around he was calling the union about one thing or another.

A. Correct . . . I told him that out of all the employees I got he was more to the union than all the whole plant together . . . I didn't tell him that that he should not call the union.

Discussion

Section 8(a)(1) of the Act prohibits employer statements and conduct that "interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights. It is undisputed that George's various inquiries to the Union and his filing of grievances are activities protected by Section 7 of the Act. *Thor Power Tool Company*, 148 NLRB 1379 (1964), enfd. 351 F.2d 584 (7th Cir. 1965); *Top Notch Manufacturing Company, Inc.*, 145 NLRB 429 (1963). The protected nature of the activity is not dependent upon the merits of the grievance or complaint. See *Mushroom Transportation Co., Inc.*, 142 NLRB 1150 at 1158 (1963), reversed on other grounds 330 F.2d 683 (3d Cir. 1964); *Interboro Contractors, Inc.*, 157 NLRB 1295 at 1298, fn. 7 (1966); *Hartwell Company, Inc.*, 169 NLRB 412 (1968). Ludtke admits that he told George "that every time you turn around he was calling the union about one thing or another . . . out of all the employees I got he was more to the union than all the whole plant together."[6] It was not asserted that these calls to the Union were in fact repetitive complaints previously resolved or constituted a technique of harassment. *Ad Art, Incorporated*, 238 NLRB 1124 (1978). These statements by a foreman could reasonably be found to have tended to interfere with or coerce employees in the exercise of their Section 7 right to file complaints and grievances with their union representative, in violation of Section 8(a)(1) of the Act.[7] Nor can Ludtke's comments be deemed other than coercive interference even if he considered the statement "friendly advice" or due to his low level of supervisory status. See *Jax Mold & Machine, Inc.*, 255 NLRB 942 (1981), and *Pickering & Co., Inc.*, 254 NLRB 1060 (1981). Similarly, Chance's admitted statement to George in August that "it would be better if he checked with the company before he went to the union," that he should consult the Union "if he couldn't get satisfaction from the company" and his threats of discharge are equally violative of Section 8(a)(1) of the Act.[8]

Events of October 3

On Friday, October 3, George left work a couple of hours before the end of the shift, telling Chance and Fleming[9] that he felt ill and could not continue working that day.[10] Fleming inquired who was going to replace George on his job, saying that George could not leave work if he did not have someone to take his place. George replied that he could not continue working, so he punched out and left. This was not the first occasion George left work due to this illness. Shortly after he arrived home, George received a telephone call from Fleming. According to George's undisputed testimony, Fleming said he talked to the Charging Party's coworkers and Garcia represented George was not sick and therefore George was to bring a doctor's note when he returned to work or he would be suspended. George admittedly got into an argument with Fleming during the phone call, taking the position that he could not be required to bring a doctor's slip unless he was on sick leave more than 3 days, and, if that were the case, he would bring a doctor's note.

Events of October 4 and 6

The following day, October 4, was a scheduled workday but George telephoned the Company and reported he would be absent. The next scheduled workday, October 6, George reported at his normal starting time, 11 a.m. About 11:30, Fleming came into the powder room and asked for the doctor's note. George again asserted that the note could not be demanded since he was not off 3 days. George then asked to talk to Chance, and Fleming granted the request. George told Chance:

> . . . I want to hear it from you that you are going to suspend me if I don't give you this doctor's note . . . [Chance] said I'm not going to say anything, you do what Leroy [Fleming] says . . . I [George] says why won't you tell me that you're going to suspend me if I don't give you the doctor's note, could it be because you know the contract says you can't demand it. He says you just do what Leroy says or you're suspended.
>
> Q. What happened then?
>
> A. So I gave Leroy the doctor's note and I told Thurman [Chance] that I was going to file a griev-

[6] There is no requirement in the collective-bargaining agreement that the employee raise the complaint or grievance initially with the Employer.

[7] See *L. E. Davis, d/b/a Holiday Inn of Benton*, 237 NLRB 1042 (1978), wherein it was found that a supervisor's telling an employee he was tired of the employee's filing grievances against him tended to inhibit employees from filing grievances pursuant to the current collective-bargaining agreement; thus the statement was deemed violative of Sec. 8(a)(1) of the Act.

[8] See *Caterpillar Tractor Company*, 242 NLRB 523 (1979), and *Interlake, Inc.* v. *N.L.R.B.*, 529 F.2d 1277 (8th Cir. 1976).

[9] Fleming did not appear and testify and no reason was advanced for the failure. Since Fleming has been found to be a supervisor, the missing witness rule will be invoked. See *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15 (1977).

[10] George stated that he had sustained a cervical strain in an auto accident and he experienced back and neck pain and severe headaches. Tom Garcia, a fellow employee, disputed George's testimony that he was injured in an automobile accident although he admitted that George had an automobile accident which completely demolished his car. Inasmuch as George has a doctor's certificate for his absence, which is undisputed, his testimony in this regard will be credited.

> ance with the union for them demanding the doctor's note and he [Chance] told me to get my ass out of the warehouse before he kicked my ass.

George then produced the doctor's note and returned to work. As an aside, Kenneth Martin[11] testified that the Employer has the discretion to require an employee to submit a doctor's certificate if the absence is less than 3 days in length.[12]

Martin further testified that in 1980 he was requested by a foreman, Ludtke, to talk to Pilgrim, George, and Garcia because they were not producing a satisfactory amount of work. Martin told them that they were producing substantially less work than the crews operating the machines on the shifts immediately before and after them. The parties stipulated that, in March 1980, the entire crew of Pilgrim, George, and Garcia received warnings because they were not producing as much as other crews. To Martin's knowledge, no employees have been discharged for poor production.

Discussion

It is undisputed that Chance threatened to kick George's butt if he did not immediately return to the warehouse after handing over the doctor's note.

As noted above, the filing of grievances or complaints that allege the Company is not in compliance with the collective-bargaining agreement is concerted protected activity under Section 7 of the Act.[13] It is undisputed that it was George's activity of questioning the Employer's right to request a doctor's note under the contract which triggered Chance's hostility toward George wherein he admonished George to return to work under the threat of physical harm. This admonishment, as noted by Garcia, was used by Chance on the same day toward the entire powder room work force. As noted above, Chance similarly threatened George in August. The subsequent use of this threat supports a finding that Chance did in fact make the alleged statement. It is found that the threat of physical harm was because George engaged in protected activity violated Section 8(a)(1) of the Act. *Broadway Catering Corp. d/b/a Studio 54*, 260 NLRB 1200 (1982); *A. A. Superior Ambulance Service*, 263 NLRB 499 (1982). That George was not shown to be fearful or apprehensive for his safety is immaterial since the test is whether the employee's conduct tends to interfere with the free exercise of rights guaranteed by the Act. *Mon River Towing, Inc.* v. *N.L.R.B.*, 421 F.2d 1, 9, fn. 24 (3d Cir. 1969). Further that Chance made similar remarks does not minimize the impact of the threat as a means of relaying his displeasure with George's activities. *McLane Western, Inc.*, 251 NLRB 1396 (1980). Therefore, it is concluded that this threat violated Section 8(a)(1) of the Act.

The Fight

Shortly after 6 p.m. on October 6, Garcia and George had a fight. According to George, the fight was ascribable to the fact that he could not keep up with the demands of the other employees for Garcia was assisted by another employee, Rodney Zimmerman, who was an extra employee since he had been substituting for George and the Company did not know George was returning on October 6. Since two people were tying the bags at the same time, George could not keep up with them. Garcia kept pushing George to work faster, repeatedly saying, "Let's go." George claims he then looked at Garcia and used an obscenity. According to George, all of a sudden Garcia, who is a bodybuilder,[14] threw a scoop at him and then hit him with the handle of a scraper[15] until it broke over George's arm, then started beating George with his fist. The Charging Party claims he refused to strike Garcia because he knew fighting was a ground for discharge and he wanted to keep his job. George subsequently went to the hospital where he was treated for cuts and bruises, and then he went home.

Garcia's version of this incident varies substantially from George's. Garcia indicated that friction between George and him was present almost from the start of the shift. About 20 to 25 minutes after the shift started, the powder room crew was still just sitting around and talking, not working, when Chance came by and said to "get our asses to work." Until a month or two before the fight, George and Garcia had been very close friends, when George made an untoward comment to Garcia which "hurt his [Garcia's] feelings" and thereafter his relations with George could not remain the same. Garcia and George also quarreled a couple of times during the 2 months preceding the fight about starting times and who was going to assume what position in the line, for George wanted to work only as the bagger, the easiest of the three positions. Also, according to Garcia, George wanted to work only when the spirit moved him, which made it difficult at times for the crew to meet their daily production quotas.

George, Garcia avers, was angry that Chance used profanity when he told them to start working and about Fleming asking George for his doctor's note. Thereafter during their breaks from work,[16] George discussed the filing of a grievance against Chance for the use of profane language when he asked them to commence work. At or about 5:45 p.m., near the end of their shift, the crew still had about 250 bags to fill to meet their quota, which required them to work quickly. George was running the bagger which determines the pace of the work. George was working very slowly, and this slow pace

[11] Currently he is the secretary-treasurer of the Union.

[12] As previously noted, the merits of a grievance or complaint are irrelevant in determining the question of whether the filing of such a grievance or complaint is a right protected under the Act. See *Interboro Contractors, Inc., supra* at 1298, fn. 7. There is no contention that George so abused his right to file grievances as to have engaged in unwarranted harassment of Respondent. Further, the evidence will not support such a contention.

[13] See *Thor Power Tool Co., supra*. Cf. *Maryland Shipbuilding and Dry Dock Co.*, 256 NLRB 410 (1981); *Des Moines AMC & Jeep Inc.*, 227 NLRB 222 (1976).

[14] Garcia is approximately 5 feet 6 inches tall and weighs about 170 pounds. In 1980, Garcia won the title of "Mr. Chicano" in a local bodybuilding contest.

[15] A scraper was described as a tool similar to a hoe which is used to scrape powder off of the floor.

[16] The crews were not given specified break and lunch periods; rather they were given daily production quotas to meet.

was accompanied by George telling Garcia, "You fucking Mexican,[17] I'm going to get you fired." George made other remarks of a similar nature.[18]

Although Zimmerman was working as an extra hand that day, according to Garcia, he was engaged most of the time in sweeping the floor and making bags for the operator. Occasionally extra hands will assist on the line if the team is behind. Garcia did not state what Zimmerman was doing immediately before the fight. Zimmerman did not appear and testify.

Garcia walked toward George when George told him "to get fucked."[19] George shoved him. Garcia then hit George with the handle of the scraper which broke when he struck George around the rib cage and then Garcia held George by his shoulder, shoved him up against the wall, and held him in a headlock. Although George struggled some, since Garcia was very strong by his own admission, the struggling was to no effect. Garcia claims he used the scraper for he knew George carried a gun on the Company's premises at times; that he had seen the gun often in George's car, and about 3 weeks to a month before the fight Garcia had seen the gun in George's back pocket. George assertedly had previously threatened to shoot Garcia from time to time, but Garcia thought it was a joke, a bluff. George claimed the gun was confiscated a year earlier by the California Highway Patrol. Garcia disclaims knowledge of any such confiscation. Garcia pleaded guilty to fighting with George in a criminal proceeding on the advice of counsel.[20]

Bill Pilgrim, the third regular member of the bagging crew on the 11 a.m. to 7 p.m. shift, was working the last position on the line at the time of the fight, loading the bags onto pallets. According to Pilgrim, George was in a bad mood on October 6. He was very argumentative and it seemed he "was slowing down on purpose"; he was not keeping the line full, contrary to his usual practice. When the altercation started, Pilgrim left the room.[21]

Payne received a telephone call from an employee at the plant the evening of October 6, arriving after both Garcia and George left. Martin told him of the fight and that George had gone to the hospital for he had "a few scratches on him." Payne called the hospital and determined that George had already been treated and left. Both Garcia and George were terminated on October 7. Chance testified that he filled out the termination notices without investigating the circumstances surrounding the fight. According to the termination slips, Garcia was discharged for "engaging in quarrelsome conduct or fighting" and George was discharged for "violation of employee work rules" as follows:

> 1—Interfering with or hindering the work of other employees with unnecessary conversations or action.[22]
>
> 2—Insubordination in any form of expression.
>
> 3—Engaging in quarrelsome conduct or fighting—immediate discharge.

It is undisputed that the company rule which is distributed to all employees and is posted on the bulletin board requires the discharge of employees involved in fights. After Chance prepared and signed the termination slips, he forwarded them to Payne for his approval.

Reinstatement of Garcia

Both George and Garcia filed grievances regarding their discharges. Larry Cox investigated the grievances, conducting interviews with the principals and Pilgrim, Martin, and Zimmerman. Cox determined that George instigated the fight by verbal harassment, deliberate work slowdown, and initiating physical action by shoving Garcia. Cox then telephoned the Union's attorney, Neil Bodine, to whom he related the conclusions he had drawn from his investigation,[23] that George was more at fault, and inquired if the Union could treat them differently. Bodine told Cox to doublecheck the facts; if the dischargees were equally at fault, they should be treated equally and, if he felt they should be treated differently, "he has the right to make a good faith judgment." Cox then discussed the matter with Brennan, Respondent's labor consultant and representative during the instant proceeding, recommending that he could raise a good defense for Garcia but not for George. Brennan then consulted with Bodine and Payne as well as with Cox, and it was determined to accept the Union's proposal to resolve the grievances by reinstating Garcia, with no back wages, and the grievance filed by George would not be pursued.

When Payne agreed to this proposal, he accepted Cox's determination that George was "more at fault," even though he was aware that an investigator from the District Attorney's office was conducting an inquiry regarding the fight, that charges were filed against Garcia who pleaded *nolo contendere* to the charge of assault, and he understood the charges were dropped against Garcia.

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[17] Garcia testified that reference to his ethnic heritage did not "bother him."

[18] Garcia stated he had received 14 warning letters and was discharged more than once for failing to meet production quotas.

[19] Garcia denies throwing anything at George.

[20] The guilty plea was changed to a plea of *nolo contendere* based on the understanding that "sentencing will be postponed for 6 months . . . at that time I will be allowed to withdraw my guilty plea and the above charge will be dismissed on stated conditions." The charge was subsequently dismissed.

[21] Pilgrim's testimony was corroborated by Joe Martin, the dryer operator who worked in a room next to the powder room. Since Martin exhibited hostility toward George and a lack of candor, not responding to the questions, voluntarily making statements adverse to George, and since he did not see the altercation, his testimony will not be considered as probative of any of the parties' positions. Martin's statements to others, however, to the effect that George was in ill temper October 6 and slept several hours that day while at work, had been awakened to return to work which upset him, is considered for its impact upon those he spoke with about the incident, including management and union representatives.

[22] Chance did not explain how he determined this basis for termination without investigation, an inconsistency which does reflect adversely upon Chance's credibility.

[23] These conclusions include Cox's determination that George was arguing about the sick leave doctor's slip incident; that he had deliberately slowed down work that day, harassed Garcia, slept during the shift and was upset at being awakened, used obscenities toward Garcia, told him he would get Garcia fired, and repeated the obscenities; and that Garcia threw something at George which missed him; then George initiated physical contact. Cox also informed Bodine that George's version was different, that he claimed he did nothing but defend himself, but that the other employees corroborated Garcia's story.

Payne further testified that he did not know whether George was similarly accused of assault by the District Attorney's office. Chance did not participate in the decision to accept the Union's recommendations that Garcia be reinstated and George remain discharged.

Discussion

Counsel for the General Counsel argues that the statements of Respondent, found in violation of Section 8(a)(1) of the Act hereinabove, cojoined with the various reasons on George's discharge slip such as "insubordination" and "interfering with or hindering the work of other employees with unnecessary conversation or action,"[24] are acts and conduct which clearly demonstrate Respondent's animus and, hence, the facts require a finding that George was discharged and not reinstated for a proscribed reason in violation of Section 8(a)(3) and (1) of the Act.

Section 8(a)(3) of the Act prohibits employer "discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organizaton." In *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and Board cases decided thereafter, analysis of unlawful refusal to hire or unlawful discharge proceeding will follow the test applied by the Supreme Court in *Mt. Healthy School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977). As explained in the *Wright Line* case, *supra*, 251 NLRB at 1089, the Board will:

> . . . require that the General Counsel make a *prima facie* showing sufficient to support the inference that [the employer's opposition to] protected conduct was a "motivating factor" in the employer's decision [to discipline the employee]. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of that protected conduct.

Payne decided to discharge both Garcia and George, consonant with the requirements of the Company's rules, and he instructed Chance to implement this decision. That Chance gilded the termination notice and Respondent threatened George by filing complaints and grievances are not inidicative, in the circumstances of this case, that an unlawful motive was a causal factor in the Employer's action. However, even assuming that the General Counsel has established by a "preponderance of the evidence" that protected employee activity was "a motivating factor" in the Employer's decision to institute disciplinary action against an employee,[25] Respondent has shown that it would have discharged George for fighting absent his protected conduct. It is undisputed that fighting was an automatic ground for discharge,[26] and this evidence is unrefuted. The consensus of the employees interviewed was that George was culpable for the fight. That Garcia was reinstated does not require or suggest a different finding. The Union initiated the reinstatement of Garcia based on its apparently unbiased investigation of the incident.

It is therefore concluded that Respondent did not discharge George in violation of Section 8(a)(3) or (1) of the Act and it is recommended that this allegation be dismissed.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, Danish Creamery Association, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead, and have led, to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

1. Danish Creamery Association is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Creamery Employees and Drivers Union Local No. 517, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3 By interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. Said unfair labor practices affect commerce within the meaning of the Act.

The Remedy

Having found that Danish Creamery Association has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[27]

The Respondent, Danish Creamery Association, Fresno, California, its officers, agents, successors, and assigns, shall:

[24] The words and phrases in quotes are asserted to be code words for protected activity.

[25] *Wright Line, supra* at 1088, fn. 11.

[26] This finding obviates a finding that the fight was a pretext for the discharge.

[27] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Threatening to discipline, to physically injure, or to otherwise reprimand or coerce employees, because they file grievances or complaints under the collective-bargaining agreement governing their terms and conditions of employment.

b. In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

a. Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

b. Post at its Fresno, California, facility copies of the attached notice marked "Appendix."[28] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

c. Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the amended complaint be, and hereby is, dismissed insofar as it alleges unfair labor practices not specifically found herein.

[28] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a trial at which all parties had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT threaten our employees with loss of employment, reprisals, physical harm, or otherwise reprimand or coerce employees because they file grievances or complaints under the collective-bargaining agreement governing their terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them under Section 7 of the Act.

DANISH CREAMERY ASSOCIATION